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In The

Supreme Court of the United States

October Term, 1989

ERIC MARROQUIN,

Petitioner,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner files this Reply Brief to correct a gross misstatement by the Government as to the timeliness of the Petition, as well as to respond briefly to some of the arguments advanced in the Opposition Brief.

1. Timeliness of the Petition

The Opposition Brief, signed by the Solicitor General of the United States, states on the first page that, a rehearing petition having been denied by the Fifth Circuit on October 30, 1989, "[t]he petition for a writ of certiorari was filed on January 26, 1990, and is therefore out of time under Rule 20.1 of the former Rules of this Court." That statement is simply not true. It ignores the fact that Justice White, on timely application under former Rule 20.1, extended the time for filing the petition to and including January 26, 1990.

The extension of time ordered by Justice White was plainly set forth in the Petition, p. 2, under the section entitled JURISDICTION. The case file in the Clerk's Office confirms that the application for the extension was timely filed, well before the expiration of the 60-day period. The application itself recognized that under Rule 20.1 the time for filing would expire 60 days from the denial of rehearing, on December 29, 1989, unless extended. The application thus requested "that the time for filing be extended, pursuant to Rule 20.1, for 28 days, to and including January 26, 1990."

It is impossible to square such an egregious misstatement with the high quality of advocacy that normally marks the Office of the Solicitor General of the United States.

2. The ambiguity of the Act

The Government argues (Op.Br. 4-5) that the language of the Speedy Trial Act amendments of 1979 "makes clear" that Congress did not intend to subject the 30-day defense-preparation period to the time exclusions of §3161(h). That assertion, however, does not dispose of the counter-argument that the Act is anything but clear in that respect. Consider what one of the leading experts on the 1979 amendments, Professor Robert L. Misner, says about this matter:[1]

a) "A careful examination of the legislative history of the

[1]Professor Misner was the reporter for the Speedy Trial Planning Group for the U.S. District Court for the Districts of Arizona and Southern California. He also testified before the Senate Judiciary Committee with regard to the 1979 amendments. That is the Committee that produced Sen. Rep. 96-212 (1979), stating that it was the Committee's intent "that the exclusions provided in section 3161(h) apply to the 30-day minimum to trial provision." See Pet. 13-14.

thirty-day minimum to trial amendment [§3161(c)(2)] is ambiguous as to the applicability of excludable time."[2]

b) "On their face, the provisions of the Act that prescribe sanctions favor the conclusion that excludable time does apply to the thirty-day minimum to trial period."[3]

c) "Resort to noncongressional sources does not alleviate the confusion."[4]

d) The 1979 amendments "are so confusing that an outbreak of litigation concerning the interpretation and applicability of their terms is to be expected."[5]

Precisely this kind of confusion and uncertainty surrounding the applicability of time exclusions to the 30-day minimum period specified in §3161(c)(2) justifies the grant of certiorari. Moreover, since this statutory interpretation problem is of such confusing and uncertain dimensions, the Court should consider whether the long-established rule of lenity here applies: "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812 (1971). See also *Dixson v. United States*, 465 U.S. 482, 491 (1984):

> As is often the case in matters of statutory interpretation, the language of [the statute] does not decide the dispute. The words can be interpreted to support either petitioners' or the Government's reading. We must turn, therefore, to the legislative history . . . to determine whether these materials

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[2]Misner, The 1979 Amendments to the Speedy Trial Act: Death of the Planning Process, 32 Hastings L.J. 635, 644 (1981).

[3]*Id.* at 646.

[4]*Id.* at 649.

[5]*Id.* at 657.

> clarify which of the proposed readings is consistent with Congress' intent. If the legislative history fails to clarify the statutory language, our rule of lenity would compel us to construe the statute in favor of petitioners, as criminal defendants in this case.

That is the principle that unravels this statutory enigma.

3. The prejudice to petitioner

The Government nowhere denies that the Fifth Circuit conceded that "less than thirty includable days had passed before his [petitioner's] trial commenced." Pet. App. 4a. But the Government asserts that petitioner "does not suggest how he was prejudiced" by that conceded fact. Opp.Br. 7.

The Government seemingly has not read the Petition very carefully. Petitioner there "suggested" that, as a result of the conceded violation of the 30-day minimum to trial period, he was not given adequate time to prepare a full defense to the charges against him — i.e., he was accorded less than the required thirty-day minimum period in which to prepare for a trial after he finally discovered or was advised "which if any of his co-defendants would be tried with him, which of the multitude of charges would be at issue at the trial, or which severed co-defendants might testify against him." Pet. 14. Indeed, the excessive and harsh sanctions resulting from this hasty trial, 25 years imprisonment and more than $300,000 in fines, could not be more prejudicial.

Finally, the Government has no response to petitioner's contention (Pet. 15) that he need not show prejudice where there has been a conceded violation of §3161(c)(2). As this Court noted in *United States v. Taylor*, 108 S.Ct. 2413, 2417 (1988), where there is a violation of a time limitation imposed by §3161(c), "the statute admits no ambiguity in its requirement

that when such a violation has been demonstrated, 'the information or indictment shall be dismissed on motion of the defendant,' [citing §3162(a)(2)]." Suffice it to say that petitioner made such a motion to dismiss, the denial of which leads to the question now before this Court. Prejudice, in short, may be presumed from the conceded violation of §3161(c).

CONCLUSION

For the foregoing reasons, supplementing those in the Petition, certiorari should be granted.

Respectfully submitted,

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